No. 72-1532

In the Supreme Court of the United States

OCTOBER TERM 1972

STANLEY W. PETERSON,

Petitioner,

vs.

BRUNO W. STANCZAK, JACK HOOGASIAN, ROBERT BABCOCK, MILBURN HEARY KRAPF, DAVID H. BIDDLE, DONALD NYSTROM, DONALD HOUTE and CHARLES E. LARSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

JOSEPH R. CURCIO
134 North LaSalle Street
Chicago, Illinois 60602
Attorney for Respondents
JACK HOOGASIAN and ROBERT BABCOCK

THOMAS J. BURKE, JR.
135 S. LaSalle Street
Chicago, Illinois 60603
Attorney for Respondent
DONALD NYSTROM

Of Counsel:
SIDNEY Z. KARASIK
135 South LaSalle Street
Chicago, Illinois 60603

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JURISDICTION

The jurisdictional requisites are adequately set forth in the PETITION.

QUESTIONS PRESENTED

It is respectfully suggested that there is nothing in the record nor in the judgment order of the Court of Appeals (set forth in Appendix to PETITION FOR CERTIORARI) on which

the purported questions presented by the petitioner can be predicated. Rather, the questions as resolved by the trial evidence are as follows:

1.

a. Is there any evidence in the record to sustain petitioner's claim of an "illegal seizure" where it appears that the police officers who came to arrest him on a warrant for murder by abortion, had an open view of the articles which he was removing from the trunk of his car?

b. Did the petitioner, represented by competent counsel, waive his alleged Fourth and Fourteenth Amendment rights by making no objections to the recovered evidence at any stage of the criminal proceeding and by pleading guilty?

c. Arguendo, if the evidence was "illegally seized" in the criminal case, was it admissible in the civil case; if not admissible, was the admission "harmless error" in the instant circumstances?

2.

a. Whether, in the civil rights action the accused defendant police officers and public officials were entitled to introduce evidence of good faith and probable cause in arresting, detaining and prosecuting petitioner for a crime which they had a duty to investigate and prosecute?

b. Whether the trial court properly limited evidence of petitioner's confession and other evidence tending to show his guilt, to the issue of good faith and probable cause?

c. Whether, in the light of all the evidence, petitioner's confession of aborting a woman, which criminal act caused her death, was voluntary or coerced, and whether the record supports petitioner's allegations of physical mistreatment and deprivation of his constitutional rights?

3.

Whether the trial court exercised its sound discretion in excluding the purported impeachment of a party defendant for lack of a proper foundation?

STATEMENT OF FACTS

Petitioner's scant "Statement of the Case" is inadequate and inaccurate.

Since the evidence adduced at the trial thoroughly disproved the allegations of petitioner's civil rights complaint, it would appear more important to summarize the nature of that evidence than to refer to the unsupported allegations.

Further, as the Court of Appeals notes, petitioner in his appeal below did not "attack the verdict of the jury as being against the manifest weight of the evidence" and the court therefore did not deem it necessary "to recount the evidence adduced at the trial." (App. 2a-3a, Pet.)

For the convenience of this Court, therefore, a restatement of the essential facts might be helpful:

The contentions of the plaintiff:

In his civil rights trial, plaintiff alleged and testified that he was arrested without a warrant, that he was never served with a warrant, that a warrant was never read to him. (Tr. 338, 340, 341, 353). At the police station, according to his testimony, he was made to strip naked, stand with other prisoners by defendant Crawford; (Tr. 337), was threatened with a stick by Officer Nystrom (Tr. 337), was denied the use of toilet facilities and given no

food or water for an extended period (Tr. 343, 357). He asserted he was "caged" in an undersized "chicken coop" and was refused medical help.

He testified that he was denied the right to make a telephone call, to engage counsel, that he was never advised of the charges against him and never saw his indictment until he was in the State penitentiary. (Tr. 344, 346, 372).

The crime under investigation:—

On April 26, 1963, Dolores Katalanich was admitted to the Great Lakes Naval Hospital, in North Chicago, Illinois. She died on the evening of April 27, 1963, after having an abortion of her child by the insertion of catheters on two different occasions. (Tr. 973-976, 979). The death of Dolores Katalanich was not contested.

Lake County Coroner Babcox contacted the North Chicago Police Department and requested an investigation into Dolores' death. Such investigation was commenced immediately. (Tr. 1052).

Plaintiff, Stanley Peterson resided in Zion, Illinois at that time. On April 28, 1963, a Sunday, police officers Krapf and Biddle of the Zion Police Department, came to Peterson's home and asked him to come with them. He complied without objection. (Tr. 112-114).

The Zion police officers acted pursuant to a call from the North Chicago police advising the Zion officers that an arrest warrant, sworn to by Captain Crawford of the North Chicago Police Department, had been issued by Police Magistrate Matjevich. (Tr. 406, 724, 726, 1056).

Officers Nystrom and Houte drove to Zion in a police squad car, took custody of Peterson, handcuffed him as a murder suspect, and drove him to the North Chicago Police Department. There the arrest warrant was read to him. (Tr. 727, 1056).

Upon delivering Peterson to the North Chicago officers, Krapf and Biddle had nothing further to do with the case.

At the North Chicago Police Station, Peterson was questioned for two and one-half hours. He stated orally that he had performed an abortion on Dolores Katalanich (Tr. 1107, 1109, 1110).

Peterson was held over night by the North Chicago Police and turned over to the Lake County Sheriff for detention until the return of an indictment by the Lake County Grand Jury.

The witnesses who implicated plaintiff:—

Mrs. Joanne Fitzjohn, (employed as a nurse at the Great Lakes Naval Hospital and a next-door neighbor of Dolores Katalanich) testified that she was in the North Chicago police station twice on April 28, 1963, once in the morning and again at noontime. (Tr. 965, 966). She told her story to Captain Crawford and other police officers; Coroner Babcox was present at the second conversation. (Tr. 966).

Mrs. Fitzjohn informed the officers that Peterson had made arrangements with Dolores Katalanich for an abortion; that Peterson met with Dolores on April 9th and that she had "passed a fetus" on April 15th. (Tr. 967).

Mrs. Fitzjohn transported Dolores in an automobile to the Billy G. Motel, at Route 63 and Skokie Highway, where Dolores was to meet Peterson. (Tr. 968).

Mrs. Fitzjohn testified that the next time she saw Dolores Katalanich she was unconscious and "I was very scared". (Tr. 968). She called Terry Green, a friend, who came to the motel to assist in taking Dolores to the hospital. Prior to their departure, Peterson removed a catheter from Dolores' slacks. (Tr. 969).

Mrs. Fitzjohn also testified that she informed Assistant State's Attorney Hoogasian that Dolores had telephoned Peterson, who arranged to meet her at McDonald's on North Lewis Avenue. (Tr. 973). An abortion was discussed at this meeting. (Tr. 973).

Mrs. Fitzjohn testified that she had related to Mr. Hoogasian that on April 15, 1963, Peterson came to Dolores' home, knocked at the door and entered with two bags containing some Southern Comfort whiskey, beer and a box of candy. He knew it was Dolores Katalanich's birthday. They had a couple of drinks together and they went into the bedroom. (Tr. 975). The witness stated she heard Dolores ask Peterson if it would hurt, and he responded that "he had done hundreds in the last 20 years and that everything was okay." It would not hurt and the liquor he brought was to relax her. (Tr. 976). Peterson took one of the bags with him into the bedroom. (Tr. 977).

The witness told Hoogasian that Peterson and Dolores stayed in the bedroom for about 20 minutes or a half hour, after which plaintiff came out and announced that everything was okay. (Tr. 977).

Mrs. Fitzjohn stated that Peterson insisted on having sexual intercourse with Dolores "to relax her." (Tr. 978) And she said that there was just one little pain during the operation. (Tr. 978). The witness related that she

informed Hoogasian that Dolores had passed the fetus, but that no afterbirth had come out, and Dolores was worried that there might be twins. Plaintiff suggested that another catheter be inserted. (Tr. 979).

Hoogasian was informed by Mrs. Fitzjohn that on April 26th, Peterson had gone into Cabin 4 at the Billy G Motel with Dolores. At Peterson's suggestion, Mrs. Fitzjohn was also there. (Tr. 980-981). The witness noticed that Dolores was in a state of shock or unconsciousness and asked Peterson what had happened, to which he responded that she is "just in shock, she will come out soon". Mrs. Fitzjohn tried to bring Dolores to consciousness, but could not. (Tr. 981, 982). Peterson put money in Dolores' purse in case she had to go to the hospital. (Tr. 982). Peterson stated that he had to remove the catheter which he took from Dolores. (Tr. 983). Mrs. Fitzjohn and Terry Green then took Dolores to the hospital. (Tr. 983).

Mrs. Fitzjohn testified that she had not been promised immunity from prosecution by Mr. Hoogasian (Tr. 982) and she stated that she told Mr. Hoogasian on April 28, 1963, that the fetus Dolores had passed on April 15th was put in a jar to save for a doctor's examination. (Tr. 994).

Terry Green was present on April 26, 1963, at the Billy G. Cabin No. 4, Zion, Illinois, and helped transport Dolores from Zion to Great Lakes Naval Hospital. Terry Green stated that Peterson was at the motel. Terry Green told what he knew of the affair to Hoogasian. (Tr. 969, 1099, 1102).

Defendant, former coroner, Robert Babcox testified that he was present at the North Chicago Police Station on April 28, 1963, when Joanne Fitzjohn was there and had related the events concerning the abortion to Captain Crawford and himself. (Tr. 1055).

Babcox was present when Peterson was brought to the police station that day and heard Captain Crawford read a warrant (Tr. 1056). Immediately after reading the warrant, Peterson was placed under arrest by Captain Crawford. (Tr. 1056).

Babcox testified that Peterson acknowledged knowing Mrs. Katalanich and that he had placed a catheter in her uterus, after which she went into shock. Peterson told the officer that Mrs. Fitzjohn had made arrangements to take Dolores to the Great Lakes Naval Hospital. (Tr. 1057, 1058).

Babcox testified that Peterson had told him that he had performed over 100 abortions in the county and that he did not know what had gone wrong with this one. (Tr. 1058). He also testified that he had charged a fee of $200.00, but that he had refunded $100.00 after having sexual relations with Dolores. (Tr. 1058).

The attempts to arrest plaintiff:—

Mrs. Peterson, the plaintiff's wife, stated that at approximately 12:30 a.m., April 28, 1963, Milburn Krapf, a Zion policeman, came to her home and requested to see her husband. (Tr. 112-114). She stated that her husband was not at home at the time, but was away at a bowling tournament in Aurora, Illinois. (Tr. 112).

The police officer returned and apprehended Peterson at approximately 3:30 p.m. that afternoon. (Tr. 112-114). Peterson's wife learned of this later and was told by the Zion desk sergeant that her husband was taken to the North Chicago police station. (Tr. 115-116). She went to the North Chicago police station and was informed by Hoogasian that her husband was being held on a charge of murder by abortion. (Tr. 119).

The open view of the seized evidence:—

At the time of his arrest, Peterson had just returned by automobile from the bowling tournament in Aurora.

When Officer David Biddle, of the Zion Police Department, arrived at the Peterson home, he saw Peterson and Officer Krapf emerging from the house. (Tr. 938). At that time Biddle picked up a valise and a small paper bag that were in the open trunk of plaintiff's car and took them to the police station. (Tr. 939) This luggage was the same described by Mrs. Fitzjohn as taken by Peterson into the bedroom at the Billy G Motel with Mrs. Katalanich, and with which he departed in his automobile. The contents of one of the bags inventoried by the police were as follows: (1) 6 used catheters; (2) 1 pint of Seven Crown liquor; (3) 14 white pills; (4) a plastic bottle; (5) a jar of vaseline; (6) some type of medicine; (7) six additional catheters; (8) a partially used bottle of Southern Comfort; (9) a fifth of Martini & Rossi Vermouth; (10) two other catheters; (11) miscellaneous wire, trays, tape and Listerine. (Tr. 752, 753).

On cross examination, Peterson acknowledged that the bag contained some of the foregoing items. (Tr. 425-427). The record shows the following:

> "Q. (By Mr. Curcio) Did you have any catheters of any kind in that bag or in the suitcase?
> A. Yes.
> Q. Were there three instead of six, sir?
> A. There may have been." (Tr. 425-426).

First encounter at the Zion police station:—

Defendant Hoogasian testified that he was present when Peterson was brought to the Zion police station in the late afternoon of April 28, 1963. (Tr. 693). When Peterson arrived at the North Chicago police station, the warrant

for his arrest was read to him by Captain Crawford, who also served a copy upon Peterson. This was done in the presence of Hoogasian. (Tr. 727, 1056). A copy of the arrest warrant was subsequently given to Peterson's attorney, Ulick, by one of Peterson's relatives. (Tr. 256).

Hoogasian denied that Peterson was asked to undress in the presence of the officers or to answer questions in a standing position. (Tr. 693). Peterson was seated in a captain's chair made of wood, and with a back. (Tr. 735).

Hoogasian related that Coroner Babcox and Captain Crawford told him that Dolores Katalanich had died at the hospital, that her death was due to aseptic abortion and that the Coroner was requested by Captain Crawford to make an investigation. (Tr. 746).

Captain Crawford also requested the Lake County Sheriff to go to the Bill G. cabin to get the blanket and bed sheets and also to obtain the fetus that had been delivered to the Great Lakes Naval Training Hospital by Mrs. Fitzjohn. (Tr. 747).

Hoogasian testified that Captain Crawford inquired of him whether "he had sufficient probable cause for the preparation of a complaint and warrant; and I said he did, based upon his investigation to date." (Tr. 747).

Mrs. Fitzjohn, who was already at the station, then made her statement in the presence of Hoogasian's stenographer. (Tr. 748).

Hoogasian identified a photograph portraying "Mr. Peterson's attire as it was at the time [Hoogasian] first saw him at the North Chicago Police Station, until later that evening." (Tr. 750). Peterson identified the same photograph. (Tr. 465).

Hoogasian also personally saw the contents in the bag that was recovered by the police. (Tr. 750).

As to the initial conversation between Peterson and Hoogasian at the police station, Hoogasian explained the absence of his secretary at the time he was questioning Peterson. He stated that "Mr. Peterson didn't want my secretary to be there when he gave answers to the questions which I asked of him." (Tr. 757). Peterson refused to answer any questions in the presence of the secretary while she was taking notes. (Tr. 757).

Hoogasian was positive that officer Nystrom did not stand behind Peterson with any object during the interrogation or threaten Peterson. (Tr. 759).

Peterson's wife arrived at the police station at approximately 5:30 p.m. on April 28, 1963. She saw her husband and was permitted to speak to him for about five minutes. (Tr. 125). She stated that he looked "haggard and tired". (Tr. 125) Mrs. Peterson was not aware that her husband, who had been absent all of Saturday night and Sunday morning, had driven from the Aurora bowling tournament to Antioch and back to Aurora for some more bowling, before returning to his home in Zion on Sunday afternoon. (Tr. 148).

When she saw him briefly at the police station, he was fully clothed. (Tr. 161). She saw no marks or bruises on him. (Tr. 161).

Hoogasian related that Peterson's parents and sister-in-law came to the police station at the time of the first interrogation of Peterson. They arrived about 10 minutes to 7:00 and left at 7:00. (Tr. 1112).

The sister—or sister-in-law said, "We can't believe it, it's not true." And Mr. Peterson said, "Yes, it is." The

wife said, "Don't say anything, we will get a lawyer for you. Don't say anything." They spoke with him. "Then they asked us about the charge, and we said that the charge was murder." (Tr. 1112). Captain Crawford then told the relatives that they had to leave.

Conferences between plaintiff and counsel:—

Peterson's wife contacted Frank Pat Daley, a Waukegan attorney, on the day of Peterson's arrest. (Tr. 126-127).

On the Tuesday following Peterson's arrest, Mrs. Peterson engaged Walter Ulick, an attorney, to represent her husband. Walter Ulick was retained on May 1st. She gave him a check in the sum of $8,000, of which $3,000 was to be his legal fee. (Tr. 131). (The balance was for the purpose of posting bond for her husband's release.)

Mrs. Peterson also discussed her husband's case with Adeline Geocaris, a Lake County attorney. (Tr. 149, 150). Peterson admitted that Attorney Adeline Geocaris visited him in the County Jail on April 30th (Tr. 505) and that he had also consulted Richard Christensen. (Tr. 505). Mrs. Peterson also testified to retention of Attorney Dick Christensen. (Tr. 150).

Attorney Walter Ulick represented Peterson from the time of his retention in May 1963, until the hearing on probation in January 1964.

Hoogasian testified that he had not advised Peterson of his right to remain silent during the first interrogation, or his right to counsel, because the law at that time did not require him to state this to the person arrested. (Tr. 1115-1116).

Attorney Ulick acknowledged that he had been furnished a copy of the indictment, a list of the State's Attorney's witnesses, and a notice of the oral statement his client had

given to the police. (Tr. 250). He stated that he had received a copy of the arrest warrant from some member of Peterson's family (Tr. 256).

Ulick stated that Peterson had never informed him, nor had ever testified of any physical mistreatment at the police station, or of threats, or of being forced into making oral statements implicating him in the death of Dolores Katalanich. (Tr. 253). Peterson never told Ulick of being threatened by Hoogasian, Stanczak or Larson. (Tr. 254). The oral statements which Peterson gave the police were not forced from him by the alleged refusal of the police to allow him the use of toilet facilities at the police station. (Tr. 255). The plaintiff never told Ulick of being forced to strip his clothes and stand naked in a circle with the defendants. (Tr. 258).

At the time that Ulick received a copy of the indictment he was not aware that "murder by abortion" was no longer a statutory offense. (Tr. 189). Ulick stated that if he had made a motion to quash the indictment on that ground, he was certain that the State's Attorney would have re-indicted Peterson on a new charge under a corrected indictment. (Tr. 273).

Bail:—

Hoogasian testified that the procedure for the release of a defendant on bail is initiated by a motion or request by the deefndant. Prior to November 29, 1963, neither Peterson nor his attorneys had requested bail. (Tr. 692). On November 29, 1963 Peterson's wife posted bond in the amount of $5,000 for his release. (Tr. 141).

Preparation of the indictment:—

Peterson was indicted on May 6, 1963 by the Grand Jury of Lake County for the crime of "murder by abortion."

"Murder by abortion" under the Illinois Criminal Code (Ill. Rev. Stats. 1959, Chap. 38, § 3) was repealed January 1, 1962.

Hoogasian prepared the indictment. The language used in the indictment encompassed all the essential allegations of the offenses of murder as defined in Sec. 9-1 of Chap. 38, Ill. Rev. Stats., 1963. (Tr. 628, 1127).*

Statute on "Murder by Abortion"—

[Ill. Rev. Stats. 1959, Ch. 38, § 3, repealed as of January 1, 1962].

ABORTION

3 Producing] Whoever, by means of any instrument, medicine, drug or other means whatever, causes any woman, pregnant with child to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the penitentiary not less than one year and no more than 10 years; or, if the death of the mother results therefrom, the person procuring or causing the abortion or miscarriage, shall be guilty of murder.

Statute on "Murder"

[Ill. Rev. Stats. 1963, Ch. 38, § 9-1].

9-1. § 9-1. Murder.] (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

Plaintiff's plea of guilty before Judge Moran:—

At the hearing before Judge Moran on November 29, 1963, Peterson stated to the court that no promises of any kind had been made to him for his plea of guilty to the

charge of Involuntary Manslaughter. He stated to the court that he was making his plea of guilty voluntarily. (Tr. 263).

Attorney Ulick testified that he knew of no force or compulsion exerted on Peterson to make his plea of guilty. (Tr. 260). Peterson gave Ulick permission to enter the plea of guilty on his behalf. (Tr. 267).

Ulick informed his client before the hearing that the Judge would ask him certain questions as to whether his plea was voluntary, and the like. (Tr. 283).

The defendants who are not Respondents:—

As the Court of Appeals notes, the court directed verdicts in favor of five of the defendants (Messrs. Krapf, Biddle, Houte, Stanczak and Larson) and the complaint was dismissed as to them.

Plaintiff took no appeal with respect to Krapf, Biddle and Houte. Biddle and Houte were the officers involved in connection with the alleged "illegal search and seizure" of the evidence recovered from plaintiff's automobile.

Although petitioner does not explicitly so state, it is assumed he seeks review in this court only with respect to defendants Jack Hoogasian (Assistant State's Attorney), Robert Babcox (Coroner) and defendant Nystrom (Police Officer).

ARGUMENT

I.

THE ARTICLES TAKEN FROM PETITIONER'S AUTOMOBILE BY THE ARRESTING OFFICERS WERE IN PLAIN VIEW AT THE TIME OF HIS ARREST, WERE NOT ILLEGALLY SEIZED PURSUANT TO ANY ILLEGAL SEARCH, AND THE TESTIMONY CONCERNING THEIR RECOVERY WAS ADMISSIBLE IN THE INSTANT CIVIL ACTION.

A. There was no illegal search nor seizure.

Petitioner asserts, "The District Court, as did the Court of Appeals, held that police officers and prosecutors can introduce evidence which was seized in violation of the Fourth and Fourteenth amendments to the U.S. Constitution in defense of a lawsuit filed pursuant to Tit. 42, §§1983 and 1985." (Pet. 6)

Building on the premise that petitioner's automobile was "illegally searched" and that the articles taken were "illegally seized" petitioner relies on the doctrine of *Mapp* v. *Ohio,* 367 U.S. 643, 648, to the effect that illegally seized evidence "shall not be used at all."

Petitioner cites this Court's holdings in *Henry* v. *United States*, 361 U.S. 98, 4 L. Ed. 2d 134, and *Whiteley* v. *Warden*, 401 U.S. 560, 28 L. Ed 2d 306, and goes on to assert that the " 'good faith' of the arresting officer basing his decision to arrest on instructions of other officers or on his belief that a warrant exists is irrelevant where no probable cause for the warrant in fact exists." (Pet. 7).

In the case at bar the record shows that a warrant in fact had issued for the arrest of petitioner. Further the preliminary investigation of the Lake County coroner and the statements made to the State's Attorney and the police by Mrs. Joanne Fitzjohn and other witnesses furnished "probable cause" for the warrant to issue. The arresting officers would indeed have been derelict in their duty to the community if they did not promptly move to apprehend the petitioner. The validity of the arrest warrant which led to the apprehension of petitioner was not questioned, and is not an issue in this cause.

The record, moreover, does not sustain petitioner's repeated contention that the evidence "was illegally seized." There is no finding to that effect at any stage of the various proceedings in the courts below—i.e., the criminal court of Lake County, the probation hearing, the habeas corpus hearing in Will County, or the U.S. District Court civil action trial.

When the police officers came to petitioner's home to arrest him, the trunk of his automobile was still open upon his return from a bowling tournament. The trunk of the car contained two or three bags; one of which contained the various abortion instruments and articles. The bags or suitcases which were recovered by Officer Biddle*, were the same bags or suitcases which were described by Witness Mrs. Joanne Fitzjohn, who testified at the Civil Rights trial that she had related to Hoogasian and Babcox that Peterson had those bags at the Billy G Motel, had taken

* Plaintiff's trial counsel stated that he had no objection to the granting of a motion for directed verdict in favor of Biddle and Houte, the Zion Police Officers who had allegedly "illegally seized" the bags. (Tr. 878).

them into the bedroom with the decedent, Dolores Katalanich and then departed with the luggage in his automobile. (Tr. 990-991)

The officers of the Zion police department had gone to Peterson's home to arrest him, pursuant to the warrant issued in North Chicago. In view of the open trunk, and what was visible to the officers, who had a right to be there, there is no reasonable basis for petitioner's contention that the evidence "was illegally seized".

In *Harris* v. *United States* (1968), 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067, the Court has said, (p. 236):

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *Ker* v. *California*, 374 U.S. 23, 42-43, 83 S. Ct. 1623, 10 L. Ed. 2d 726; *Hester* v. *U.S.*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 392."

The court has applied the "plain view" doctrine, expressly or by implication, in other cases: *United States* v. *Lee* (1927), 274 U.S. 559, 47 S. Ct. 746, 71 L. Ed. 1202; *United States* v. *Lefkowitz*, (1932) 285 U.S. 452, 52 S. Ct. 420, 76 L. Ed. 877; *Trupiano* v. *United States* (1948), 334 U.S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663; *Stanley* v. *Georgia* (1969), 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542; see also *Coolidge* v. *New Hampshire* (1971), 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564.

In those cases it was recognized that an arresting officer may look around at the time of the arrest and seize those fruits and evidences of crime or those contraband articles which are in "plain sight" and in his immediate and discernible presence, especially, as in *Harris* and *Ker*, supra,

where the officers are deemed to "have a right to be in the position to have that view." (See Annotation, "Search & Seizure, Observation of Objects in Plain View," 29 L. Ed. 2d 1067).

Moreover, in the case at bar, if there was a search of petitioner's automobile, which led to the recovery of the items in question, that search and seizure was incidental to a lawful arrest and was contemporaneous therewith. See: *Coolidge* v. *New Hampshire,* 403 U.S. 443, at p. 456, quoting from *United States* v. *Rabinowitz,* 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653; *Vale* v. *Louisiana,* 399 U.S. 30, 33, 90 S. Ct. 1969, 26 L. Ed. 2d 409, in turn quoting from *Shipley* v. *California,* 395 U.S. 818, 819, 89 S. Ct. 2053, 23 L. Ed. 2d 732.

The Court has noted the difference between a search of a dwelling house or other structure and a search of a vehicle. It has enunciated the "exigent circumstances" doctrine which might justify even a warrantless search of an automobile in circumstances that would not justify the search without a warrant of a house or an office. *Chambers* v. *Maroney* (1970), 399 U.S. 42, 48, 90 S. Ct. 1975, 26 L. Ed. 2d 419. (See Annotation, "Validity under Federal Constitution of Warrantless Search of Automobile," 26 L. Ed. 2d 893.

On the false premise that the abortion instruments and other articles recovered by the police officers from the trunk of petitioner's car were the fruits of an "illegal seizure", petitioner argues that the exclusionary rule of *Mapp* v. *Ohio* (1961), 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, extended to the instant civil rights action.

On this point, the Court of Appeals makes the arguendo observation:

> "Even if defendant Biddle was legally unjustified in grabbing the bag, so that their contents could not be used to convict the plaintiff, nor perhaps to show probable cause, it would be an overzealous extension of the exclusionary rule to deny the defendants the opportunity to use it *to corroborate the other information* in their possession, so [as] to show they acted in honest belief defendant had committed a crime." (App. 5a Pet.) (Emphasis added).

The sole authority for the petitioner's proposition that the *Mapp* doctrine is applicable to the case at bar, in his *ipse dixit* assertion:

> "There is no basis in law or logic for not applying the exclusionary rule to evidence illegally seized in violation of the Fourth Amendment of the Constitution merely because the instant suit is a civil action as distinguished from a criminal prosecution." (Pet. 7).

While the cases on the point are not numerous, a few cases have held that evidence obtained either by illegal search and seizure are nevertheless admissible as evidence in civil cases. Annotation in 5 A.L.R. 3rd 670, "ADMISSIBILITY, IN CIVIL CASE, OF EVIDENCE OBTAINED BY UNLAWFUL SEARCH AND SEIZURE."* The applicability of the exclusion rule in a forfeiture case (*viz.* petitioner's citation of *One Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, (Pet. 8)) is on the rationale that a forfeiture proceeding, although technically a civil matter, is in substance and effect a

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* Citing Barker, Admissibility in Civil Actions of Constitutionally Protected Evidence, 34 Albany L. Rev. 512 (Spring, 1970); Note, Constitutional Exclusion of Evidence in Civil Litigation, 55 Va. L. Rev. 1484 (Dec. 1969).

criminal proceeding such as to justify an extension of the protection of the Fourth and Fourteenth Amendments to the owner of the property.

B. Under applicable Illinois law, Petitioner waived his right to object to the allegedly impermissible evidence.

Still assuming, arguendo, that the abortion instruments and other articles taken from his automobile at the time of petitioner's arrest, was an "illegal seizure", petitioner had an obligation to assert his Fourth and Fourteenth Amendment rights, if any, in the right forum and at the right time—namely, in the State Court in which he was prosecuted.

Petitioner, however, did not seek to suppress such evidence at that time in that court, although he was represented by competent counsel of his own choice. Again, the items in the bag were introduced in evidence during the probation hearing of January 1964 and again, no objection was made to the evidence. (Tr. 416). Petitioner had a further opportunity to challenge the legality of the evidence in the course of the habeas corpus proceedings, but again failed to do so.

In the circumstances, petitioner's failure to make timely and opportune objections constituted, under Illinois* law, a waiver of his right to complain of the admissibility of

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* *People* v. *French* (1965), 33 Ill. 2d 146, 210 N.E. 2d 540 Cert. Den'd, 384 U.S. 1016; *People* v. *Harris*, (1965) 33 Ill. 2d 389, 211 N.E. 2d 693, Cert. Den. 383 U.S. 971; *People* v. *Green*, (1967) 36 Ill. 2d 349, 223 N.E. 2d 101; *People* v. *Nilsson* (1970) 44 Ill. 2d 244, 255 N.E. 2d 432, Cert. Den. 398 U.S. 954.

the allegedly tainted evidence.** Thus it is a general procedural requirement, both in state and in fedreal courts that if a criminal defendant wishes to preserve his right to challenge on appeal the constitutionality of a search and seizure to which certain evidence has been obtained, he must take timely steps in the lower court, either through a motion to suppress the evidence or through a sufficient objection, when the evidence is offered at trial, to let it be known that he objects to the use of the evidence on the ground that it has been obtained through an unreasonable search and seizure. *U.S.* v. *McCarthy,* 430 F. 2d 1289 (9th Cir.); *U.S.* v. *Chastain,* 435 F. 2d 686 (7th Cir.); *U.S.* v. *Newton,* 442 F. 2d 622 (9th Cir.), cert. den. 404 U.S. 844.

Petitioner's plea of guilty, voluntarily and understandingly made (while represented by counsel), to the charges of "murder by abortion", itself constituted a waiver of his claim of unlawful search and seizure. *United States* v. *Sturm,* 180 F. 2d 413 (7th Cir. 1950), cert. den. 339 U.S. 986; *People* v. *Deweese,* 27 Ill. 2d 332, 189 N.E. 2d 247 (1963); *Bee* v. *Beto,* 384 F. 2d 925 (5th Cir. 1967); Anno. 20 A.L.R. 3rd 724, "Plea of Guilty as Waiver of Claim of Unlawful Search and Seizure".

Moreover, it should be noted that in the case at bar it was not the recovered items which were introduced into evidence or shown to the civil rights jury, but only the ac-

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** The applicability of State law on the subject of waiver was expressly recognized in *Mapp* v. *Ohio,* where the court said: "As is always the case . . . State procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected." (Ftnt. 9, 367 U.S. 643, 659).

count of the seizure by the arresting officers and what they inventoried. What they inventoried in the bag, coupled with what the plaintiff told them at the police station, cumulatively created and supported respondents' honest belief that petitioner had committed a crime. The Court of Appeals aptly observes:

> "It should be noted that plaintiff did not appeal with respect to Biddle (the Zion police officer) and does not contend [that] any defendant against whom this appeal is pursued *knew* the bags were unlawfully seized. Yet, he claims the gist of their offense was malice." (App. 5a Pet.) (Emphasis added).

Independently of what the officers testified as to what they inventoried in the bag, Peterson himself acknowledged on cross-examination in the civil rights trial, that he had catheters in the bag. (Tr. 425-426).

C. The error, if any, of admitting the evidence of the seizure was harmless and not prejudicial.

As above shown, the evidence of the alleged illegal seizure was cumulative and independent of other competent evidence sufficient to furnish a belief by respondents that Peterson had committed an illegal abortion which resulted in death. Moreover, the trial judge was careful to admonish and to instruct the jury on the limited purpose for which the evidence was received.

It has been held that even where the trial court commits error by admitting evidence in violation of the *Mapp* rule, such error does not necessitate reversal where it does not appear that the evidence may have affected the verdict. *Chambers* v. *Maroney,* 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed.

2d 419; *Pasterchik* v. *United States* (1968), 400 F. 2d 696 (9th Cir.) cert. den. 395 U.S. 982; *Williams* v. *United States* (1968), 399 F. 2d 636 (9th Cir.).

In the case at bar, the defense to the civil rights action was the good faith and probable cause of respondents in arresting and prosecuting Peterson. His guilt or innocence of the crime was carefully excluded as an issue.

If the question of the propriety of the seized evidence arose in the criminal proceedings, where his guilt or innocence was an issue, the test of prejudicial error would be whether there was a reasonable possibility of the evidence having affected the verdict. *Mapp* v. *Ohio,* 367 U.S. 643, supra; *Vale* v. *Louisiana,* 399 U.S. 30; *Coolidge* v. *New Hampshire,* 403 U.S. 443.

But, where, as in the case at bar, there was substantial, even overwhelming, evidence furnished to the respondents by other persons to base a belief that Peterson had committed murder by abortion, the verdict in favor of defendant at the civil rights trial could hardly have been affected by the testimony concerning the inventory of the suitcase taken from petitioner's car at the time of his arrest. Even in criminal cases, where the admission of evidence obtained through an unreasonable search and seizure was merely cumulative of our competent evidence, the doctrine of harmless error has been applied. *United States* v. *Blackburn* (1968), 389 F. 2d 93 (6th Cir.); *United States* v. *Reed* (1968), 392 F. 2d 865 (7th Cir.) cert. den. 393 U.S. 984.

II.

DEFENDANTS ACTED IN GOOD FAITH AND WITH PROBABLE CAUSE IN ARRESTING PLAINTIFF FOR A CRIME AND THE JURY SO FOUND.

A. The trial court properly permitted respondents to introduce evidence, including petitioner's voluntary confession, tending to show that he had committed a crime which respondents had a duty to investigate and prosecute.

The petitioner asserts under his proposition II:

> "The issue involved in this petition is whether a prosecutor and police officers who elicited a confession by physical coercion so that it was involuntary, as distinct from being obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, can use said confession to prove 'good faith' in their defense to a suit pursuant to Title 42, §§1983 and 1985." (Pet. 8)

The allegation that respondents "elicited a confession by physical coercion" is completely false, as shown by the overwhelming evidence in the record, and the jury did not believe petitioner's tale of respondents' alleged misconduct.

Th key issue for the jury's determination was whether respondents had violated petitioner's civil rights when they arrested, detained and charged him with a crime. Their defense was that they acted in good faith and with probable cause.

In the trial court, Peterson objected to the introduction of his confession on the ground that his guilt or innocence of the crime for which he was arrested and sentenced was "immaterial" to a civil rights action.

It is concededly true that Peterson's guilt or innocence of the crime of murder by abortion or of any other crime, standing by itself, would not be an issue in the civil rights action. It is therefore important to understand at this juncture the precise reason why the trial judge permitted the testimony to which petitioner objected. The evidence was not admitted for the purpose of showing plaintiff's guilt or involvement in the crime as such, but for the probative value it had in reflecting the intent of the defendants at the time they were investigating the death of Dolores Katalanich. (Tr. 244, 418).

The trial court several times stated that the intent of the defendants with respect to their conduct toward the plaintiff was to be tested "not in the light of whether he was guilty of murder by abortion or not, but whether he was guilty of any crime which they (the officers) believed he should be charged with." (Tr. 22, 74-79, 673).

The court noted that the jury in the civil rights case would have to decide not only whether Peterson was sent to prison on a nonexistent statutory offense, but whether defendants caused his imprisonment with deliberate intent to violate his civil rights. (Tr. 677). The jury was carefully and properly instructed on this point.*

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* In ruling on plaintiff's objections to defendant's opening statement refering to plaintiff's confession to the crime, the trial court restated the issues of the case to the jury and said:

> "I merely want to suggest to you that in considering these opening statements you further bear in mind that we are not here to try, whether Mr. Peterson was, or was not guilty of any particular offense. We are here to try his allegations that the defendants interfered with his civil rights and conspired to deprive him of certain rights which he and you and I, and everyone else are entitled to as citizens of the United States." (Tr. 79) See also Tr. 20-22, 418-421, 494).

Unlike *Kerr* v. *City of Chicago*, 424 F. 2d 1134 (7th Cir. 1970), cited by petitioner (pet. 8)—where the prejudicial error was the failure properly to instruct the jury—in the case at bar no contention was made in either of the courts below that the jury was not properly admonished or instructed on any issue in the case.

1. The defense of good faith and probable cause was available to the defendant under 42 U.S.C. §1983.

Good faith and probable cause constitute a valid defense to a civil rights action of the kind brought by plaintiff in the instant case. The trial court scrupulously followed the law in permitting the evidence to which petitioner objects.

In *Pierson* v. *Ray* (1967), 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288, plaintiffs, while attempting to use segregated facilities at a bus station in Mississippi, were arrested by municipal police officers on charges of having violated a Mississippi "breach of peace statute." Plaintiffs were ultimately acquitted of the alleged offense. They then sued, *inter alia*, the police officers for damages for false arrest and violation of their civil rights under 42 U.S.C. §1983. The court held that the defense of good faith and probable cause were available to the defendants under §1983. The court declared at p. 555:

> "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid, but was later held unconstitutional, on its face or as applied."

The Court went on to clarify its holding in *Monroe* v. *Pape*, 365 U.S. 167 (1961), 81 S. Ct. 473, 5 L. Ed. 2d 492, and said at p. 556:

> "... we in no way intimated [in Monroe] that the defense of good faith and probable cause was foreclosed by the [Civil Rights] statute ... we went on to say ... section 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions'. ... *Part of the background of tort liability in the case of police officers making an arrest is the defense of good faith and probable cause.*" (Emphasis added).

The Court went on to say, at p. 557:

> "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common law action for false arrest and imprisonment, is also available to them in the action under Sec. 1983."

In numerous cases it has been held that where probable cause exists, civil rights are not violated by an arrest, even though innocence may be subsequently established, or even where the criminal defendant has been charged or tried under an inapplicable or invalid statute: *Beauregard* v. *Wingard*, 362 F. 2d 901 (9th Cir. 1966); *Gabbard* v. *Rose*, 359 F.2d 182 (6th Cir. 1966); *Kenney* v. *Fox*, 232 F. 2d 288 (6th Cir. 1956); *Agnew* v. *City of Compton*, 239 F. 2d 226 (9th Cir. 1956). In the latter case the Court said, at p. 231:

> "No one has the constitutional right to be free from a law officer's honest misunderstanding of the law or facts in making an arrest."

It has been held that the action of a police officer cannot be deemed tortious under the Civil Rights Act when he proceeds on the basis of a reasonable, good faith under-

standing of the law, and does not act with unreasonable violence or subject the citizen to an annual indignity in the investigation and arresting of the citizen. See: *Bowens v. Knazze*, 237 F. Supp. 826 (D.C. N.D. Ill. 1965); *Hebert v. Morley*, 273 F. Supp. 800 (D.C. C.D. Cal. 1967).

It is of especial significance that in all of the aforecited cases, good faith and probable cause on the part of the arresting officers and prosecutors was held to be a valid defense precluding recovery under §1983, even though the civil rights of the plaintiff in each of those cases established his *innocence* in the State prosecutions.

The case at bar presents an even stronger basis for the applicability of the good-faith-and-probable cause defense under which defendants adduced their evidence: Stanley Peterson's innocence was never established but his confessed guilt of *a* crime was. The fact that the crime of "murder by abortion" did not exist in the statute books at the time when plaintiff was indicted for the alleged offense, and that this was the basis for his habeas corpus release from the penitentiary, did not mitigate the fact that he was in fact guilty of a crime. He took the life of Delores Katalanich and he *freely confessed* to that act as the record overwhelmingly shows.

The trial judge focused the issue with this apt observation (made outside of the jury's presence):

> "The testimony, thus far, *by virtue of Mr. Peterson's testimony*, reveals him to be either an aider or abettor or conspirator in the death of this girl. He was charged under the wrong statute—which is your 'offense' but you cannot argue backwards and say, that because murder by abortion was no longer in the Code, [that] what he did was not a crime." (Tr. 761-762).

Responding to plaintiff's argument that Peterson's guilt or innocence "is immaterial to a civil rights case", Judge McGarr pointedly said:

> "I am not trying to try him. I have tried to keep his guilt or innocence on the abortion—underlying abortion charge or murder by abortion charge out of this case.
>
> "But your argument suggests to me—and this is why I rebutted it—that because the crime of murder by abortion was not existent at the time of the conduct of Mr. Peterson—whatever the evidence determines it to be—that he could not be guilty of anything, because there was no crime of murder by abortion.
>
> "Now, what I am saying to you is that you have to test, in this case—I do and the jury does—the *intention* of these officers and other public officials with regard to their conduct toward him, not in the light of whether he was guilty of murder by abortion or not; but whether he was guilty of any crime *they* [respondents] *believe he should be charged.*" (Tr. 672-673).

2. The evidence of plaintiff's guilt and confession, and defendants' reasonable belief that Peterson committed a crime, was admissible to negative plaintiff's charge of a "conspiracy" under 42 U.S.C. §1985.

In addition to his claim of a violation of section 1983, plaintiff's civil rights complaint alleged that "defendants had entered into a conspiracy to deprive him of equal protection of the laws" under 42 U.S.C. §1985.

Again, arguing on the false premise that his confession was "extracted by coercion"—contrary to the facts found by the jury—petitioner intimates by his argument that the confession should not have been admitted into evidence for *any* purpose, because of the resulting alleged confusion in the minds of the civil rights jury.

Plaintiff's civil rights complaint alleged that he was "illegally" arrested, detained and mistreated at the police station and his confession to the crime was coerced from him pursuant to a "conspiracy".

Thus petitioner himself placed in issue *the total circumstances* attending the giving of his confession. Whether that confession was voluntary or coerced by the respective defendants, could not be tried in a vacuum. How and in what manner he came to admit the illegal act, could not be centrifugally separated from the content of this oral admission.

The trial of the civil rights cause did not dwell on plaintiff's guilt or innocence of the crime he confessed, but the circumstances under which he confessed. If "confession" resulted from plaintiff's joinder of counts for recovery of damages under both sections 1983 and 1985 of Tit. 42, U.S.C., the risk was entirely plaintiff's. If evidence of good faith and probable cause was competent and relevant on the issue of §1983, such evidence was equally admissible to negative the allegations of "conspiracy" under §1985.

Defendants could not be guilty of a conspiracy to perform their lawful duties, as they reasonably understood their duties, and if they acted together in the honest belief that plaintiff had caused the death of Delores Katalanich by performing an illegal operation, this was a complete defense to the conspiracy charge.

To recover under §1985 plaintiff had to show that defendants had a "purposeful intent" to deprive him of his equal protection of the laws. *Weise* v. *Reisner*, 318 F. Supp. 580 (D.C. Wisc. 1970). Defendants had a reciprocal right to negative the element of "purposeful intent" by introducing evidence of their reasonable and honest belief of Peterson's guilt of a crime.

Had plaintiff sustained his burden of proof that brutality and indignity was visited upon him from the time of his arrest until the alleged "coerced" confession, then it would be true that the state of mind of the prosecutor and arresting officers would have been "irrelevant". But the record, as hereafter discussed, completely belies petitioner's assertion. His fanciful tatle of an illegal arrest, of not being advised of his right to counsel, of being kept naked at the police station, of being caged in an undersized "chicken coop" of being denied access to toilet facilities, medical help, water and food, of becoming exhausted by this ordeal*—each and every horrendous allegation are contradicted by the facts in the record together with the repeated impeachment of plaintiff's veracity when he was confronted with numerous instances of prior inconsistent statements in other impeaching circumstances. (See Appendix hereto).

B. Plaintiff's confession of guilt was not coerced and the circumstances under which the confession was given were admissible on the issue of probable cause.

Petitioner argues that the District Court should not have admitted evidence which respondents gathered concerning his alleged criminal activities, because the introduction of such evidence emasculated his civil rights remedy. The

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* The foregoing catalog of alleged police brutality and horrors visited upon Peterson by the instant police officers, is so remarkably parallel to the alleged police misconduct in *Kerr* v. *City of Chicago*, 424 F. 2d 1134 (7th Cir. 1970), involving another person in another city, at another time, that the coincidence should not escape unnoticed. The reasonable inference is that Peterson simply copied the allegations of the complaint in the *Kerr* case whether they fitted his facts or not.

novel argument posed by petitioner in his "Catch-22" dilemma is that if the party is in fact guilty of a crime, the more careful the court must be to exclude that evidence from the civil rights jury. Such a proposition is refuted by its absurdity.

Under proper instructions, as given by the trial court in the instant case, the jury was entitled to consider the "voluntariness" of Peterson's confession in relation to all the circumstances under which it was given. In *Kerr* v. *City of Chicago*, 424 F. 2d 1134 (7th Cir. 1970) the court said, at p. 1138:

> "To consider whether the confession was voluntary, it is necessary for the jury to be allowed to consider all relevant facts regarding the circumstances under which a confession from the plaintiff was obtained.
>
> * * *
>
> "Thus the jury was entitled to hear the testimony surrounding all the events from the moment Kerr was taken from his home until his indictment by the Grand Jury. All the acts of commission and omission—the *totality of all the circumstances*—are of great importance in determining whether plaintiff's confession was coerced in violation of his civil rights, and thereby cognizable under 42 U.S.C. §1983". (Emphasis added).

In *Kerr*, the Court of Appeals found reversible error because the trial court admitted the confession into evidence "without proper instructions [to] the jury" (p. 1139). The error was the refusal of the trial court in that case to give certain tendered instructions.

In the case at bar the jury was carefully instructed as to the limited purpose for which Peterson's confession was admitted into evidence. No assignment of error was made as to the propriety in the giving or refusal of instructions.

If it was permissible for plaintiff to show "the totality of circumstances" surrounding the giving of his oral confession while detained, the same rule permitted the defendants to establish that they acted in good faith. Neither the truth nor the falsity of Peterson's confession, nor his guilt or innocence was the thrust of the defense, but the facts and chronology of events which led to the confession as bearing upon the issue of voluntariness.

A trial court is vested with considerable latitude in the receipt of evidence which bears on the issue of probable cause: See: *Nesmith* v. *Alford*, 319 F. 2d 859 (5th Cir. 1963); *Daniels* v. *Van de Venter*, 382 F. 2d 29 (10th Cir. 1967).

Although petitioner pretends that his confession was involuntary and coerced, it is significant that at no stage in the criminal proceeding in Lake County did Peterson ever assert or intimate that his confession was not freely given: If he had been physically mistreated or mentally tormented into giving his confession, it would have been entirely logical and natural for him to have so informed his family and his attorney.

Yet Ulick, testifying on cross-examination stated that he could not recall the plaintiff ever having informed him about being forced to make any oral statements at the North Chicago Police Department. (Tr. 253). Plaintiff never informed his attorney at that time, or at any time, that he had been threatened in any way by the police officers associated with the North Chicago Police Department, or that defendants Hoogasian, Stanczak or Larson had ever threatened him. (Tr. 254). The oral confession at the police station was not, according to Ulick, the result of an alleged refusal to permit plaintiff to use the

bathroom facilities. (Tr. 255). Plaintiff had never informed Ulick that he had been forced to strip off his clothes and stand naked in a circle composed of the various defendants. (Tr. 258).

The attorney knew of no force or coercion which tainted plaintiff's plea of guilty to the charge of involuntary manslaugher. (Tr. 260). At the time of his arraignment, before Judge Moran, plaintiff denied that any promise had been made to him and satisfied the court that the plea of guilty was voluntary and not produced by threats or coercion, and that he gave his attorney permission to enter the plea of guilty on his behalf. (Tr. 262, 263, 267).

If plaintiff felt under some "duress" which prevented him from repudiating his confession before his imprisonment, it is especially significant that plaintiff's petition for writ of habeas corpus was completely silent as to any alleged coercion in the making of his confession, nor was such evidence adduced before the Will County judge who released petitioner from Stateville Penitentiary.

III.

THE TRIAL COURT PROPERLY EXCLUDED THE PROFFERED "IMPEACHMENT" TESTIMONY AND IN ANY EVENT THE EXCLUSION WAS HARMLESS ERROR.

Plaintiff called Sgt. John Flood of the Cook County Police Department in an effort to impeach the veracity of defendant Jack Hoogasian, then the Assistant State's Attorney of Lake County. Plaintiff proposed to do this, not by confronting Hoogasian with any prior inconsistent statements, but to attack defendant's credibility by "reputation".

Flood testified that he knew Hoogasian professionally and had met him approximately four or five times. (Tr. 824). In response to *voir dire* inquiries by the Court, Sgt. Flood stated that he had formed his personal opinion as to Mr. Hoogasian's truthfulness; that the opinion was his own based on his "familiarity" with the defendant. (Tr. 839).

Responding to the court's questions, the witness stated that he had discussed Mr. Hoogasian's reputation as to truth and veracity with some 60 odd police officers of the City of Waukegan, and approximately 40 some odd police officers in the Lake County Sheriff's Police Department. (Tr. 839-840). The witness stated that his knowledge and opinion of Mr. Hoogasian's veracity in reputation for truhtfulness arose out of his investigation of certain matters in Lake County and interviews that he and others had with Hoogasian. (Tr. 840).

The Court thereupon precluded plaintiff from eliciting any further testimony from Sgt. Flood, and made the following observations:

> "In any event, while I am certain that Sgt. Flood's opinion is his own, and is expressed in good faith, and that he is willing to testify in good faith, I have doubt that his knowledge of the reputation of Mr. Hoogasian represents his general reputation in the community for truth and veracity. And I think that is the only thing that you can put in, if you can put anything in, counsel. Therefore, I'm going to sustain the objection to Sgt. Flood's testimony." (Tr. 841).

The plaintiff thereupon proceeded to make an offer of proof outside the presence of the jury.

It should be noted that plaintiff had called Hoogasian as his own witness. A trial court has a broad discretion in permitting or disallowing a party to impeach his own witness. *Journeyman Plasters' etc.* v. *NLRB,* 341 F. 2d 539 (7th Cir. 1965); *U.S.* v. *Ghaloub,* 385 F. 2d 567 (2nd Cir. 1966); *Stevens* v. *U.S.,* 256 F. 2d 619 (9th Cir. 1958).

It is apparent from the colloquy that the plaintiff laid an insufficient foundation upon which to establish the reputation testimony sought to be elicited from Flood. Not only was Flood insufficiently familiar with Hoogasian's general reputation in the Lake County Community, but the trial court doubted that Flood could testify probatively as to Hoogasian's reputation "among co-workers". The Court of Appeals relied upon *Michelson* v. *U.S.,* 335 U.S. 469, 478 and noted that the rule it applied in *U.S.* v. *Parker,* 447 F. 2d 826, 831 (7th Cir. 1971) would not be availing to plaintiff in the instant case.

The trial court, in its discretion determined that Sgt. Flood's knowledge of defendant's work-community reputation was no better founded than his knowledge of Hoogasian's general reputation in the community.

Finally, as the Court of Appeals aptly notes:

> "In any event, the exclusion of the impeaching reputation testimony was harmless error because plaintiff had been thoroughly discredited by other evidence." (App. 6a Pet.)

In the circumstances, the propriety of excluding Sgt. Flood's testimony was not such a substantial question as to merit this Court's review.

CONCLUSION

Petitioner purports to raise substantial and sensitive constitutional questions by asserting that "illegally seized" evidence and a "coerced confession" were introduced in his civil rights action, so as to deprive him of a fair trial. The facts do not fit his theory and the record totally discredits his assertions of impropriety.

Although petitioner was released from the penitentiary on the technical fluke that he had been sentenced for a statutory offense, "murder by abortion", (which had been repealed before his indictment), plaintiff proceeded on the false premise that any defenses of good faith and probable cause by the public officials involved in his arrest, detention, prosecution and imprisonment, were untenable and had to be excluded from his civil rights trial.

The courts below however correctly ruled that in the circumstances, the defendants were entitled to show by the evidence that they honestly and reasonably believed, *ab initio,* that Peterson was guilty of criminal activity to which he orally and freely confessed and admitted in open court, both on his plea of guilty and at his subsequent probation hearing.

The defenses of good faith and probable cause were relevant to the allegations of plaintiff's complaint that defendants had violated his civil rights under §1983 and §1985 of the Civil Rights Act. The state of mind of the defendants was germane to their conduct in relation to the plaintiff.

The record shows that the trial court carefully admonished and instructed the jury at all phases of the trial from the outset, during the taking of testimony and in jury

instructions, and that the evidence of plaintiff's confession of guilt was limited solely to the question of good faith and probable cause and not to re-try plaintiff's guilt or innocence. There was no error in the admission or exclusion of evidence and plaintiff was not deprived of a fair trial.

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH R. CURCIO
THOMAS J. BURKE, JR.
Attorneys for Respondent

Of Counsel:
SIDNEY Z. KARASIK

Appendix follows:

APPENDIX

APPENDIX

APPENDIX

Peterson's self portrait as a victim of official brutality, forced to confess a crime he did not commit and suffering alleged indignaties, is belied by the record. The picture is also demolished by the repeated impeachment of plaintiff when confronted by prior inconsistent statements and conduct:

> Peterson denied ever receiving a copy of the indictment, a list of the State's witnesses or of the notice of his oral statements. The official docket entry of the Lake County proceedings before Judge Moran (Plaintiff's own Exhibit 6), showed that on May 7, 1963, in open court, plaintiff was presented with those documents. (Tr. 388).
>
> Peterson acknowledged that the Lake County transcript of the proceedings reflected the service of those papers upon him (Plf. Ex. 3) but denied the truth of that portion of the transcript. (Tr. 389).
>
> Plaintiff denied that after April 28, 1963 he was ever shown or read a copy of the arrest warrant charging him with murder, and asserted that he did not see such a document until it was subpoenaed by his lawyer, Mr. Kutner in 1971. (Tr. 401, 403). But on June 17, 1966 he wrote a letter, over his signature, to John W. Freelds, Court Administrator of the Illinois Courts, Springfield, Illinois, relating his arrest on April 28, 1963, and stating in part:
>
> > "At this time I was handcuffed by police from another city and taken to their police station. *At this time I was read a warrant.*" (Tr. 407).

Plaintiff admitted that the contents of one of the bags taken from the trunk of his automobile by the police, contained several rubber catheters, liquor, drugs and some of the other articles inventoried by the police. (Tr. 425-427).

Peterson acknowledged that "he may have" told Hoogasian that he felt the pressure of puncturing a membrane. (Tr. 454).

He admitted that at the Coroner's inquest he told Babcox that the reason he confessed to committing the abortion was because he thought someone else might have done it "and I was giving him time to get out of town", by "him" referring to "Joan Fitzjohn'.' (Tr. 456).

Peterson stated that the last time he saw Dolores Katalanich was on April 26, 1963, in an automobile outside of Cabin 4 at Billy G. Motel, and that he did not believe that she was conscious. (Tr. 458). He admitted helping Terry Green and Joanne Fitzjohn carry Dolores out of Cabin No. 4. (Tr. 459).

He admitted that at the probation hearing on January 21, 1964, he had given catheters to women for the performance of abortions upon their person. (Tr. 460). He admitted swearing to the truth of his testimony at the probation hearing (Tr. 460) and that at the hearing he told the court "that he had provided the instruments" for the performance of abortions. (Tr. 464, 465).

Peterson identified a photograph taken by photoflash at the North Chicago Police Station when he emerged from a room, which photograph showed him fully clothed. (Tr. 465).

Although he testified that he had been "exhausted" by the police interrogation in the afternoon and evening of April 28, 1963, he admitted that he had bowled in a tournament in Aurora on April 27, 1963, had left Aurora for dinner in Antioch, Illinois, a distance of 70 or 80 miles, visited a number of taverns in Lake County after dinner, returned to Aurora between 2:00 and 4:00 a.m. of April 28th, spent the early morning hours with a bowling companion before returning to his home in Zion. (Tr. 469).

He admitted that he had tried to rest and relax at the police station, although he was being questioned about a crime, that he fell asleep in his cell and had slept before his wife visited him at the police station, and that he had slept in this fashion, even though he had "excruciating" bladder trouble. (Tr. 471).

On cross-examination, he stated he did not know from the questions put to him by the police officers, what had happened to Dolores Katalanich, except that she was taken to a hospital. (Tr. 472). On June 4, 1969, at a deposition he had stated that he first learned that Dolores Katalanich had died when he was at the North Chicago Police Station (Tr. 474).

At the probation hearing, Peterson, responding to questioning by his own attorney, stated:

> "He came in and suggested after looking at her and talking briefly, that we get her to a hospital, so I said, well, I wanted to see if she had a catheter in her. If she has we will have to take it out and send her to the hospital, so I removed it." (Tr. 491).

Peterson remembered that before Dolores Katalanich was taken from the Billy G. Motel room, that he opened her purse and put $80.00 in it. (Tr. 492) On cross-exami-

nation Peterson also acknowledged that his wife had retained a lawyer for him, Pat Daley, that Mrs. Adeline Geocaris was also retained on April 30, 1963, that Mrs. Geocaris visited him in the Lake County Jail, that he instructed his wife to discharge Mrs. Geocaris the following day, that Richard Christensen, a lawyer, was consulted, but not retained, and that Mr. Ulick was retained on May 1st. (Tr. 505-506).

What Peterson really complains of in the instant petition is that the trial court permitted the defendants the opportunity to establish that plaintiff was an incorrigible liar and that his tale of deprivation of his civil rights was simply fiction.